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IN THE

Supreme Court of the United States

October Term 1968

No. 506

DR. ALLEN DAHL; LYLE EINHAUS; DR. FRANK J. RIGOS; KENNETH ROGSTAD; DR. RICHARD CLARK; DENNIS G. HAGEN; SELMER THORP; and DR. CHARLES R. WOLFE,
Appellants,

v.

THE REPUBLICAN STATE COMMITTEE, and C. MONTGOMERY JOHNSON, Chairman,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

JURISDICTIONAL STATEMENT

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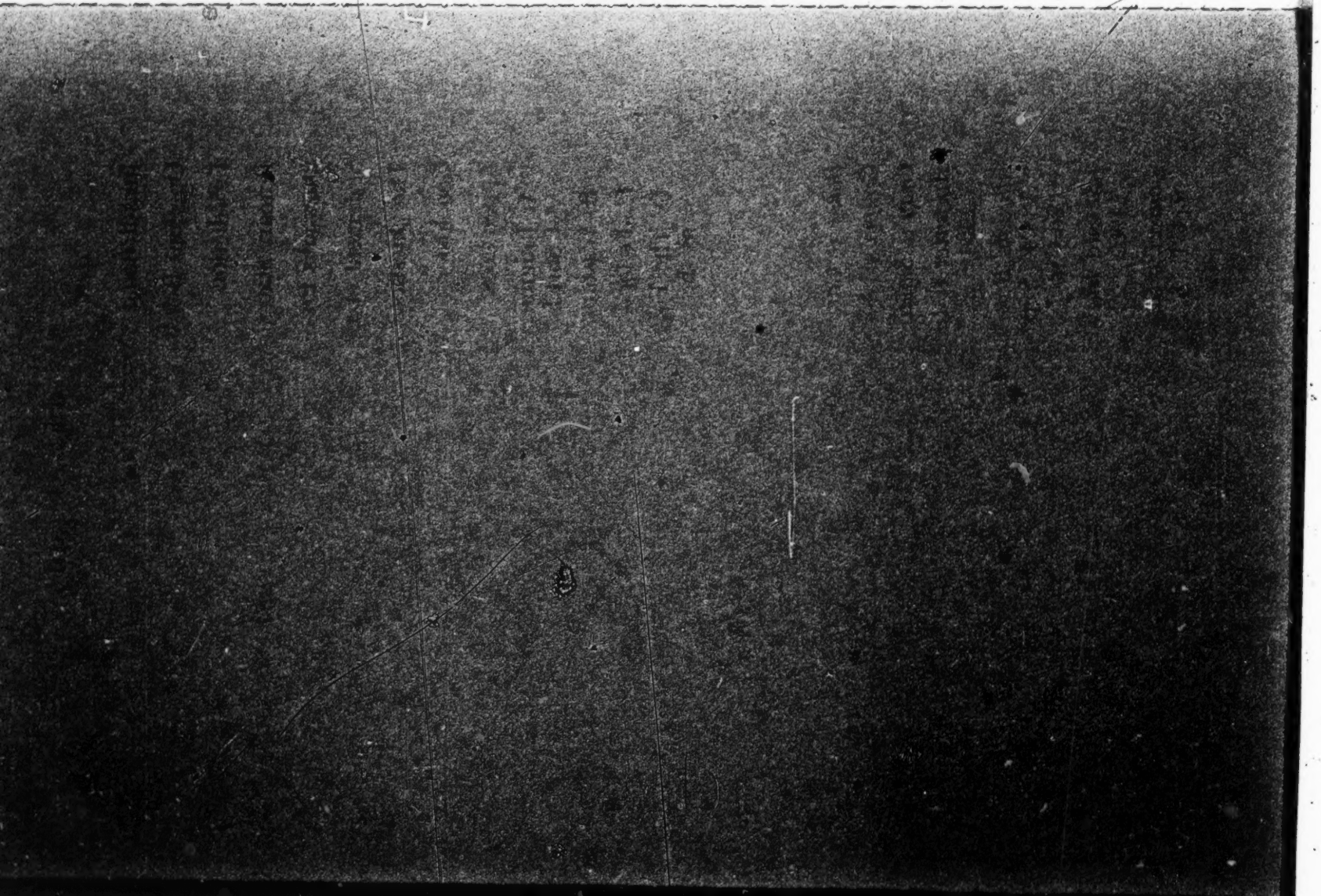

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THE REPUBLICAN STATE COMMITTEE, and C. MONTGOMERY JOHNSON, Chairman,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

JURISDICTIONAL STATEMENT

This appeal is taken by Dr. Allen Dahl, *et al.*, from a judgment and decree of dismissal entered on July 15, 1968 in accordance with the Memorandum Orders, dated April 12, 1968 and June 4, 1968, of the District Court of the United States for the Western District of Washington, sitting as a three-judge statutory court specially invoked by virtue of the provisions of 28 U.S.C. Sec. 2281. This statement is submitted by appellants to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The judgment and decree of dismissal dated July 15,

1968 and the Memorandum Orders dated April 12, 1968 and June 4, 1968 are unreported and are attached hereto as Appendix A.

JURISDICTION

This action was brought under 28 U.S.C. Secs. 1343(3), 2201, and 2281 and 42 U.S.C. Sec. 1983, seeking a declaratory judgment and injunctive and other appropriate relief to restrain as unconstitutional the enforcement, operation or execution of state statutes and to redress the deprivation under color of state law, statute, regulation, custom and usage, of federal constitutional rights. The judgment of the District Court was entered on July 15, 1968 and notice of appeal was filed in that court on August 2, 1968. The jurisdiction of this court to review the decision by direct appeal is conferred by 28 U.S.C. Sec. 1253. The following decisions sustain such jurisdiction in this case: *Baker v. Carr*, 369 U.S. 186 (1962); *Gray v. Sanders*, 372 U.S. 368 (1963); *Reynolds v. Sims*, 377 U.S. 533, (1964).

PRIMARY STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Sections 29.42.010 and 29.42.020 of Chapter 9 of the Laws of 1965 of the State of Washington are set forth in Appendix B (A-9, *infra*).

28 U.S.C. Secs. 1343(3), 2201, and 2281, and 42 U.S.C. Sec. 1983, are set forth in Appendix C (A-10-12, *infra*).

The Fourteenth Amendment to the Constitution of the United States, Section 1, is set forth in Appendix D (A-13, *infra*).

QUESTIONS PRESENTED

1. Whether the Washington statutes challenged herein (A-9, *infra*) unconstitutionally and unlawfully deny appellants, and the classes of citizens and voters they represent, the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the Constitution of the United States in that said state statutes require the organization of the state committee of each major political party in the state of Washington on the sole basis of equal representation *of counties* of unequal population, rather than on the basis of equal representation of voters.

2. Whether the "one man-one vote" principle of *Gray v. Sanders*, 372 U.S. 368 (1963), applies to the statewide bodies (Republican and Democratic State Committees) created by the state legislature and authorized to call political party conventions for the purposes of electing delegates to national party conventions, of nominating presidential electors, and of filling vacancies on the party's ticket presented to the voters at general elections.

3. Whether the three-judge statutory court invoked herein should have decided this case on its merits and not have dismissed appellants' action for failure to state a claim upon which relief can be granted.

4. Whether the three-judge statutory court invoked herein abused its discretion in this case in denying appellants' motions for preliminary injunctions.

STATEMENT OF THE CASE

This case presents the very question reserved by this court in *Gray v. Sanders*, 372 U.S. 368, 378, fn. 10, when it stated:

> "10. We do not reach here the questions that would be presented were the convention system used for nominating candidates in lieu of the primary system."

Appellants, as Republican County Chairman and Precinct Committeemen from each of the four most populous urban counties of the State of Washington, brought this class action on behalf of themselves and their respective Republican County Committees and as representatives of the rank and file electors and registered voters in their counties, against appellees Republican State Committee and its chairman to restrain the enforcement, operation or execution of certain state statutes (A-9, *infra*) which vest control of the Republican state organization in appellees in a manner to effectively deprive appellants of their right to have their vote be equally represented in the state elective process.[1] The manner of deprivation is as follows: Of the thirty-nine (39) counties of the state of Washington, the four most populous urban counties contain 60.5% of the state population and 62.3% of the voters casting Republican ballots in the 1964 Presidential election; yet these four counties are entitled under state law to only 10.3% of the representation on appellee committee by virtue of the statute's granting each county two (2) votes, regardless of population. Thus, the voters of the four populous urban counties are placed in a per-

1. It should be noted that the statutes attacked by appellants were enacted in substantially their present form in 1925, and have never been changed in light of the "one man-one vote" rulings by this Court. Laws, State of Washington Ex. Sess. 1925, ch. 158.

petual minority voting status on all questions concerning the exercise of the statutory powers of major political party organizations, including the power to call conventions for the election of delegates to state and national nominating conventions, the power to fill vacancies on the party ticket presented to the voters at general elections, and the power to nominate presidential electors. The effect of this statutory deprivation of equal representative voting power is to deny to the electors and voters of the four populous urban counties the exercise of their full franchise in an integral part of the state and federal elective process, namely the nomination of candidates for public office, including the offices of President and Vice-President of the United States.

Appellants specifically requested that the statutes be declared unconstitutional and sought appropriate injunctive relief.

The three-judge District Court in an order printed as Appendix A dismissed the action for failure to state a claim upon which relief can be granted, with leave to amend the complaint. In so doing the court held that the statutes creating the state committee on a county unit basis were not unconstitutional and therefore there was no jurisdiction for a three-judge court. It expressly refused to pass on the question of whether the so-called "one man-one vote" principle is applicable to state nominating conventions.

Appellants then filed an amended complaint in two counts. Count I reiterated appellant's attack on the state statutes, seeking that they be declared unconstitutional, that Appellees be restrained from taking any action pursuant to said statutes and from organizing the Republican

State Committee on any basis other than one giving equal representation to the electors and voters of the state, and that Appellee Committee be dissolved and its promulgated rules and regulations be declared null and void.

In Count II, appellants sought a declaratory judgment that the formula adopted by Appellees for the allocation of delegates to the Republican State Convention, held on June 21-22, 1968, was unconstitutional and that Appellees be restrained from proceeding to organize and hold a Republican State Convention wherein allocation of delegates thereto was other than based on a formula representative of the citizens or Republicans to be represented at the Convention. The District Court struck the amended complaint for lack of jurisdiction of a three-judge court, again with leave to amend the complaint.

At page 2 of the Memorandum Order (A-5, *infra*) the three judges stated their purpose in dismissing as follows:

> *"In so doing, it was the court's intention to furnish plaintiffs a clean-cut ruling against their contention that the state statute is unconstitutional, which plaintiffs could appeal to the Supreme Court if they so elected."* (Emphasis added.)

Appellants did not amend a second time and the decree of dismissal was entered, from which this appeal is taken.

THE QUESTIONS ARE SUBSTANTIAL

Appellants attack the constitutionality of Washington statutes (A-9, *infra*) which *require* the organization of major political parties on a county-unit basis. The state committees so organized are delegated by statute certain broad powers including the power to determine and allo-

cate delegates and representatives to party conventions, both state and national, at which the party's candidates for president and vice-president of the United States are nominated.

The statutory imposition of the county-unit basis for representation results in a disparity of representation within the state committee whereby one voter of San Juan County has the voting strength of approximately 366 voters of King County. Similar distortions exist throughout Washington whereby counties having 20 or less voting precincts nevertheless have the same voice as King County with over 2200 voting precincts. The result of permanently relegating the populous counties to a minority voice in the statutory state committee is to permanently establish minority control over those aspects of the election process assigned by statute to the political parties.

Because the control of the election process delegated to the appellee Republican State Committee is vested in a body created without regard to equality of representation (either voter or population), the exercise by the body of such control cannot and does not reflect the will of the majority of the voters, electors, or population, and is therefore in violation of the letter and spirit of the "one man-one vote" principle of *Gray v. Sanders*, 372 U.S. 368 (1963).

Appellants' challenge to the constitutionality of the state statutes creating and empowering the Republican State Committee is not an intra-party problem,[2] nor is it nec-

2. The Democratic Central Committees of several major counties sought leave to intervene in the instant action as parties plaintiff and were allowed to file *Amicus* briefs.

essarily of concern only within the state of Washington. Rather the challenge is to *state action* which delegates a portion of the state's election power to an unrepresentative body which in turn selects those persons who, as convention delegates and in the absence of any type of a state primary election, represent the voters of this state in the selection of nominees for the offices of president and vice president of the United States.

A central issue presented by appellants to this court is whether a state can delegate to an unrepresentative body the power to legislate by resolution or otherwise within the state and Federal election process.

Appellants' rights asserted here can only be protected by attacking the underlying statutes creating the state committee and not by merely attacking the delegate formula promulgated by that committee in respect to a particular convention. It is the state committee which by law governs and controls the convention and could, if it desired, change its formula for selecting delegates at any time up to and at the convention. Pursuant to RCW 29.42.010 it could even choose delegates to a national convention *directly* without holding a convention for that purpose.

To imply, as the District Court did, that the composition of the state committee need not be on the basis of "one man-one vote" as long as the formula for selecting delegates to the state conventions is on that basis is analogous to a ruling that a state legislature need not be apportioned on the basis of "one man-one vote" so long as on all roll calls, for example, the votes of individual legislators were

somehow weighted to reflect population. Such a solution would fail totally to strike at the heart of the problem just as an attack solely on the formula for delegate representation would fail to get to the real issue here.

This question is of great significance to each voter in the state of Washington. It should be of interest to all the voters in the United States since to find that the state of Washington can legislatively create such a body and endow it with the powers of acting *for* the state without the responsibility of being a fair and representative body merely creates the means by which any state can circumvent and otherwise avoid the constitutional principles heretofore held applicable to primary elections, *Terry v. Adams,* 345 U.S. 461 (1953); *Smith v. Allright,* 321 U.S. 649 (1944); *United States v. Classic,* 313 U.S. 299 (1941), through the instrument of a state convention in lieu of a primary election. See *Gray v. Sanders,* 372 U.S. at 378, fn. 10.

If the "one man-one vote" principle can be so readily avoided by the device of a state-wide nominating convention, then any state for any purpose can avoid the constitutional mandate enunciated by this Court. If the county-unit is a satisfactory basis, there can be others; the ingenuity required is not great once the path has been indicated. There is no reason to believe that the discrimination permitted to exist in the state of Washington where the issue is one of equal representation between sparsely populated rural counties and heavily populated urban counties cannot be duplicated elsewhere, although the character and nature of the discrimination may vary according to the time, place and the disposition of the legislature establishing the system.

Because the District Court below dismissed Appellants' action for failure to state a claim upon which relief can be granted, this Court is presented with an opportunity to reassert its statement in *Baker v. Carr*, 369 U.S. at 199, to the effect that such dismissals are not justified unless the asserted federal constitutional claim is deemed unsubstantial and frivolous. The District Court below did not so deem Appellants' claim and dismissed their action on the ground that Appellants had not challenged the statutes establishing Appellee Committee, but rather the manner in which Appellee Committee had exercised the power delegated to it by the State Legislature, a matter the three-judge statutory court found to be outside its jurisdiction. Appellants submit to this Court that their claim may be novel but it is the very question reserved in *Gray v. Sanders*, 372 U.S. at 378, fn. 10.

Like *Gray v. Sanders*, this is a voting case. The election in question is the presidential election. In Washington state the presidential election is in fact a state-wide election for presidential electors who are elected by majority vote of the people and cast their nine votes as a slate for the presidential and vice presidential candidates nominated by their political party at its national convention, RCW 29.42.020. The geographical unit for which the electors are chosen is the entire state of Washington. See *Gray v. Sanders*, 372 U.S. at 379-380. Thus the presidential election in the state of Washington must be on the basis of one man-one vote. Once that is clear it follows automatically that "The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to *all* phases of state elections," including the crucial phase at which the candidates are nominated. *Gray v. Sanders*,

372 U.S. at 380. The only times when Washington voters have a voice in the election of the president of the United States are (1) election day when they elect presidential electors and (2) when, if they choose, they participate in the election of delegates to the state convention and the national nominating convention. As this court has recognized, "as a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made." *Newberry et al. v. United States,* concurring opinion, 256 U.S. 232 at 286.

In the language of *Phillips v. United States,* 312 U.S. 246, 251 (1941), Appellants' claim seeks

> to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an administrative board or commission.

Appellees' enforcement, operation and execution of these state statutes represent the actions of a legislatively-delegated committee in the interest of the state as a whole; that is, in the enforcement of a state-wide policy through a statute of statewide application. When the result of this state-wide policy is the denial of equal voting rights, then in the words of *Cooper v. Aaron,* 358 U.S. 1, 17 (1958),

> . . . the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action . . . or whatever the guise in which it is taken . . .

Appellants' action against Appellee Committee and its Chairman is within the jurisdiction of the three-judge statutory court specially invoked herein by virtue of 28 U.S.C. Sec. 2281.

Because the District Court below chose not to decide this case on its merits, but rather to dismiss for failure to state a claim upon which relief can be granted, it did not grant the injunctive and other appropriate relief requested by Appellants. The result of this denial was to prevent Appellants and the citizens and voters they represent from effectively participating in the Republican State Convention held on June 21-22, 1968. The District Court need not have denied the relief requested. As a practical matter, the three-judge court could have decided the case on its merits. If on appeal this Court then chose to hold that the three-judge court had been mistakenly convened, the decision of the three-judge court nonetheless would have been jurisdictionally valid. On the other hand, should this Court now hold that the three-judge court should have reached the merits of the case and reverse the District Court's dismissal, then the entire case will have to be heard *de novo* by a properly constituted three-judge court. This extended delay and duplication of judicial effort has more greatly harmed and will further more greatly harm Appellants in the denial of their right to participate equally in the elective process of this state than had the three-judge court proceeded to hear the merits of the case.

Cf. *Stratton v. St. Louis, S.W. Ry.*, 282 U.S. 10 (1930), *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908), and the procedural chaos caused by this problem in *Idlewild-Bon Voyage Liquor Corp. v. Rowan*, 188 F. Supp. 434 (S.D.N.Y. 1960), 289 F.2d 426 (2d Cir. 1961), 194 F. Supp. 3 (S.D.N.Y. 1961); *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713 (1962), 212 F. Supp. 376 (S.D.N.Y. 1962); aff'd as *Hostetter v. Idlewild Liquor Corp.*, 377

U.S. 324 (1964). Such refusal by the District Court to hear the merits of this case is an abuse of discretion within the jurisdiction of this Court to correct.

CONCLUSION

It is respectfully urged that this Court has jurisdiction of this Appeal and should reverse the judgment of the District Court denying Appellants their federal constitutional right to participate and be represented equally in the state elective process. It is submitted that the questions presented by this Appeal are substantial and of great public importance.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

DR. ALLEN DAHL; LYLE EINHAUS; DR. FRANK J. RIGOS; KENNETH ROGSTAD; DR. RICHARD CLARK; DENNIS G. HAGEN; SELMER THORP; and DR. CHARLES R. WOLFE,

Plaintiffs,

v.

THE REPUBLICAN STATE COMMITTEE; and C. MONTGOMERY JOHNSON, Chairman,

Defendants.

Civil No. 7557
Memorandum Order

This is a suit by certain officials of the Republican Party, who reside in the four most populous counties of the State of Washington, challenging the constitutionality of R.C.W. 29.42.020. They bring this action in their individual capacities and as representatives of certain classes of voters in those counties.

The complaint attacks the constitutionality of R.C.W. 29.42.020, which provides that the state committee of a major political party shall be composed of one committeeman and one committeewoman from each county. The gravamen of the complaint, however, is the allegation that the voters of the four most populous counties in the state are under-represented at the state convention, which meets to elect Washington's delegates to the Republican National Convention, and for other purposes.

Plaintiffs assert that by reason of this under-representation they are denied a fair voice in the choice of the Republican nominees for the Presidency and Vice Presidency of the United States; and that such constitutes a denial of equal protection under the Fourteenth Amendment, as interpreted in *Baker v. Carr*, 369 U.S. 186, 32 S.Ct. 691, 7 L.ed2d 663 (1962); *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801, 9 L.ed.2d 821 (1963); *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.ed.2d 506 (1954) and other cases.

The number of delegates to represent each county at the state convention is not determined by statute, but in accordance with a "formula," established by the Republican State Central Committee. In establishing the machinery for apportioning delegates to the state convention among the several counties, the committee is exercising the power granted by R.C.W. 29.42.010 which provides:

> "Each political party organization shall have the power to: . . . (3) Elect delegates to conventions, state and national; . . ."

Thus, the true thrust of the complaint is that the Republican State Central Committee, in establishing that formula, has deprived plaintiffs and those whom they represent of the equal protection of the laws, in violation of the Fourteenth Amendment. If we assume arguendo that plaintiffs are correct, their claim that disproportionate representation at a state convention to elect delegates to the national convention is a denial of equal protection is at best an assault upon the constitutionality of the manner

in which the state committee has exercised the power delegated to the party organization by the Washington State Legislature, and not an attack upon the constitutionality of the statute which establishes the state committee. So viewed, it is clear that the complaint raises no genuine challenge to the constitutionality of a state statute, and the jurisdictional requirements for a three-judge court, as set forth in 28 U.S.C. Sec. 2281, are absent. *Phillips v. U.S.*, 312 U.S. 246, 61 S.Ct. 480, 85 L.ed. 800 (1941).

It should be noted, however, that this court does not, at this time, pass upon the constitutional issue raised by plaintiffs: namely, whether the so-called "one man-one vote" principle is applicable to state nominating conventions. We hold only that the facts alleged, even if proved, would not support the relief which plaintiffs seek, the declaration that R.C.W. 29.42.020 is unconstitutional.

The complaint is structured entirely as a challenge of the statute, and the relief sought could not be granted unless this court found the statute unconstitutional. Accordingly, the motion to dismiss the complaint for failure to state a claim is granted. If plaintiffs desire to amend they shall make such intention known by notice in writing served and filed within five days from the date hereof. If plaintiffs so elect they are granted leave to file an amended complaint within 15 days thereafter.

If plaintiffs elect not to amend, a decree of dismissal may be presented upon three days' notice. Otherwise this memorandum order shall serve as the order of the court.

Dated this 12 day of April, 1968.

/s/ GILBERT H. JERTBERG
United States Circuit Judge

/s/ WILLIAM J. LINDBERG
United States District Judge

/s/ W. T. BEEKS
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

DR. ALLEN DAHL; LYLE EINHAUS; DR. FRANK J. RIGOS; KENNETH ROGSTAD; DR. RICHARD CLARK; DENNIS G. HAGEN; SELMER THORP; and DR. CHARLES, R. WOLFE,
Plaintiffs,

v.

THE REPUBLICAN STATE COMMITTEE; and C. MONTGOMERY JOHNSON, Chairman,
Defendants

Civil No. 7557
Memorandum Order

Plaintiffs' original complaint stated a single cause of action, seeking a declaration that R.C.W. 29.42.020 was unconstitutional and that an injunction be issued restraining actions taken pursuant to that statute. Plaintiffs also requested that a three-judge court be convened to hear the case, as required by 28 U.S.C. Sec. 2281 in cases where such relief is sought.

This three-judge court was convened by order of February 19, 1968. By memorandum order of April 12, 1968, this court held that, ". . . the complaint raises no genuine challenge to the constitutionality of a state statute, and the jurisdictional requirements for a three-judge court, as set forth in 28 U.S.C. Sec. 2281, are absent. . . . Accordingly, the motion to dismiss the complaint for failure to state a claim is granted."

In the same order, however, this court made clear that it did not purport to pass upon the question of whether there had been an unconstitutional exercise of powers granted by a state statute; and granted plaintiffs leave to file an amended complaint. In so doing, it was the court's intention to furnish plaintiffs a clean-cut ruling against their contention that the state statute is unconstitutional, which plaintiffs could appeal to the Supreme Court if they so elected. This court also provided plaintiffs with the alternative of filing an amended complaint limited to the issues upon which this court had expressly declined to rule. Such issues could only be litigated before a single United States District Judge, inasmuch as they did not assert a challenge to the constitutionality of a state statute.

The court's order was apparently misunderstood in this respect. In the amended complaint filed by plaintiffs, Count I re-asserts in essence substantially all of the allegations of the original complaint, while only Count II is directed to the issues left open by this court's memorandum order. Both Counts request that a three-judge court be convened to hear the case.

Defendants now move to strike and dismiss each Count of the amended complaint on the ground that there is no

jurisdiction for a three-judge court, and upon the further ground that the amended complaint fails to state a claim upon which relief may be granted.

The motion to strike the amended complaint and each of the causes of action therein stated on the ground that there is no jurisdiction for a three-judge court is granted. This being so, this court has no jurisdiction to entertain the motion to dismiss for failure to state a claim upon which relief may be granted. Plaintiffs are granted leave to file a seconded amended complaint, which shall be limited to the question of whether the Republican State Central Committee has exercised its statutory powers in a manner which deprives plaintiffs of constitutional rights, and, which shall be heard by a single-judge court. If plaintiffs desire so to amend, they shall make such intention known by notice in writing served and filed within five days from the date hereof. If plaintiffs so elect they are granted leave to file a second amended complaint within fifteen days thereafter.

If plaintiffs elect not to amend, a decree of dismissal may be presented upon three days' notice. Otherwise this memorandum order shall serve as the order of the court.

Dated this 4th day of June, 1968.

/s/ GILBERT H. JERTBERG
United States Circuit Judge

/s/ WILLIAM J. LINDBERG
United States District Judge

/s/ W. T. BEEKS
United States District Judge

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

DR. ALLEN DAHL; LYLE EINHAUS; DR. FRANK J. RIGOS; KENNETH ROGSTAD; DR. RICHARD CLARK; DENNIS G. HAGEN; SELMER THORP; and DR. CHARLES R. WOLFE, *Plaintiffs,* v. THE REPUBLICAN STATE COMMITTEE; and C. MONTGOMERY JOHNSON, Chairman, *Defendants.*	**Civil No. 7557** **Judgment and Decree of Dismissal** **Three Judge Court**

This matter came on for hearing on March 23, before the undersigned judges of a Three Judge District Court on defendant's motion to dismiss the complaint for failure to state a claim. The court having heard argument of coun-

sel, having read the record and file herein, and having entered a memorandum order dated April 12, 1968, granting defendants' motion to dismiss the complaint for failure to state a claim but giving plaintiffs leave to file an amended complaint; and having further entered its memorandum order dated June 4, 1968, striking the amended complaint and each of the causes of action therein stated; in accordance with the aforesaid memorandum orders dated April 12 and June 4, 1968, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiffs' motion to dismiss the complaint for failure to state a claim should be and the same hereby is granted and said complaint is dismissed with prejudice.

DATED this 15th day of July, 1968.

/s/ GILBERT H. JERTBERG
United States Circuit Judge

/s/ WILLIAM J. LINDBERG
United States District Judge

/s/ W. T. BEEKS
United States District Judge

Presented by:
FREDRIC C. TAUSEND

Approved as for form and for entry,
Notice of presentation waived:
EDWARD N. LANGE

APPENDIX B

Revised Code of Washington:

29.42.010 Authority—Generally. Each political party organization shall have the power to:

(1) Make its own rules and regulations;

(2) Call conventions;

(3) Elect delegates to conventions, state and national;

(4) Fill vacancies on the ticket;

(5) Provide for the nomination of presidential electors; and

(6) Perform all functions, inherent in such an organization: *Provided,* That in no instance shall any convention have the power to nominate any candidate to be voted for at any primary election.

29.42.20 State committee. The state committee of each major political party shall consist of one committeeman and one committeewoman from each county elected by the county committee at its organization meeting. It shall have a chairman and vice chairman who must be of opposite sexes.

APPENDIX C

28 United States Code:

§ 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. As amended Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part III, § 121, 71 Stat. 637.

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. As amended May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub.L. 85-508, § 12(p), 72 Stat. 349.

§ 2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

42 United States Code:

§ 1993. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979.

APPENDIX D

United States Constitution:

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FILED
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IN THE

Supreme Court of the United States

October Term, 1968
No. 596

DR. ALLEN DAHL; LYLE EINHAUS; DR. FRANK J. RIGOS; KENNETH ROGSTAD; DR. RICHARD CLARK; DENNIS G. HAGEN; SELMER THORP; and DR. CHARLES R. WOLFE,

Appellants,

v.

THE REPUBLICAN STATE COMMITTEE, and C. MONTGOMERY JOHNSON, Chairman,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

APPELLEES' MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1968
No. 596

DR. ALLEN DAHL; LYLE EINHAUS; DR. FRANK J. RIGOS; KENNETH ROGSTAD; DR. RICHARD CLARK; DENNIS G. HAGEN; SELMER THORP; and DR. CHARLES R. WOLFE,
Appellants,
v.
THE REPUBLICAN STATE COMMITTEE, and C. MONTGOMERY JOHNSON, Chairman,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal of the Appellants herein be dismissed on the ground that the appeal is not within the jurisdiction of this Court, or, in the alternative, move that the decree of the District Court be affirmed on the ground that the questions raised by Appellants are so unsubstantial as not to warrant further argument.

JURISDICTION

The jurisdiction of this court is challenged on the grounds that the three judge court was improperly convened for the

reasons that : (1) no inunction restraining the acts of a state officer or administrative board or commission is sought; and (2) no genuine challenge to the constitutionality of the state statute is raised by the complaint. For either of these reasons jurisdiction of this court is not present since the action was not one "required by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. § 1253. *Moody v. Flowers,* 387 U.S. 97, 87 S. Ct. 1544, 18 L. Ed.2d 643 (1967).

QUESTIONS PRESENTED

1. Whether Appellees constitute a "state officer" or a "board or commission" within the meaning of those terms in 28 U.S.C. § 2281?

2. Whether the adoption by a party state committee of a rule establishing a formula for the allocation of delegates to a state convention, allegedly defective under the one man-one vote doctrine, raises a question of the constitutionality of the state statute creating the committee or merely the question of the consitutionality of the exercise of the statutory authority granted to the committee?

3. Whether the "one man-one vote" principle is applicable to the nomination of candidates for the president and vice-president of the United States of America, when the constitutional method of election to such office is not in accordance with that principle?

4. Whether the "one man-one vote" principle is applicable to the selection of officials of a political party?

ARGUMENT

I. Appellees are not a state officer or state commission or board within the meaning of 28 U.S.C. § 2281.

A. 28 U.S.C. § 2281 is to be strictly construed.

The requirements of 28 U.S.C. § 2281 are of substance and not of form. See *Wilentz v. Sovereign Camp,* 306 U.S. 573, 59 S. Ct. 709, 83 L.Ed. 994 (1939). The three judge court is a statutory creature with a limited sphere of operation. It is an extraordinary court and the technical requirements relating to its jurisdiction are to be strictly construed. *Bailey v. Patterson,* 369 U.S. 31, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962); *Phillips v. United States,* 312 U.S. 246, 61 S. Ct. 480, 85 L. Ed. 800 (1941).

The purpose of the three judge court was to prevent a single federal judge from interfering with the actions of state officers performing their duties pursuant to state statutes. Justice Frankfurter in *Phillips v. United States, supra,* clearly sets forth the background and purpose of the statute when he stated at pages 248-51:

> "By Section 266 [now 2281] . . . Congress provided an exceptional procedure for a well understood type of controversy. The legislation was designed to secure the public interest in 'a limited class of cases of special importance.' *Ex Parte Collins,* 277 U.S. 565, 567, 72 L. Ed. 990, 991, 48 Sup. Ct. 585. It is a matter of history that this procedural device was a means of protecting the increasing body of state legislation regulating economic enterprise from invalidation by a conventional suit in equity. While Congress thus

sought to assure more weight and greater deliberation by not leaving the fate of such litigation to a single judge, it was no less mindful that the requirement of three judges, of whom one must be a justice of this court or a circuit judge, entails a serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice. And all but the few great metropolitan areas are such regions. Moreover, inasmuch as this procedure also brings direct review of a district court to this court, any loose construction of the requirements of Section 266 would defeat the purposes of Congress, as expressed by the jurisdictional act of February 13, 1925, to keep within narrow confines of our appellate docket. . . . *The history of Section 266 . . ., the narrowness of its original scope, the piecemeal explicit amendments which were made to it . . ., the close construction given the section in obedience to congressional policy . . ., combine to reveal Section 266 not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such.*" (Emphasis Supplied)

The absolute necessity of a state officer being the party sought to be restrained was emphasized in *Wilentz v. Sovereign Camp, supra*, wherein the court stated at page 579:

"The reasons for the adoption of the extraordinary procedure prescribed by § 266 of the Judicial Code in the class of cases defined by it, and the rule that it may be invoked only when the suit is one to restrain state officers, have often been pointed out. . . . The requirement is one of substance, not of form, and it is not satisfied by joining, as nominal parties defendant,

> state officers whose action is not the effective means of the enforcement or execution of the challenged statute. . . .
>
> "By its terms § 266 embraces only those cases in which an interlocutory injunction is sought to prevent the operation of a state statute 'by restraining the action' of a state officer 'in the enforcement or execution of such statute'."

Continuing at page 582, the Court said:

> "The extraordinary procedure for a court of three judges, designed for a specific class of cases sharply defined by the statute, can not properly be extended to cases in which there is no substantial basis for relief by injunction restraining the action of state officers in enforcing or carrying into effect a challenged state statute of general application."

Likewise in *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U.S. 386, 54 S. Ct. 732, 78 L. Ed. 1318 (1934) the Court in the following language explained the necessity of the presence of a state officer:

> "The procedure prescribed by § 266 may be invoked only if this suit is one to restrain the action of state officers. . . . That this condition is vital is sufficiently indicated by reference to the part played by *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 Sup. Ct. 441 . . . in inducing enactment of the section." 292 U.S. at p. 390.

Appellants apparently assume that Appellees are a state officer or a state board or commission within the meaning of 28 U.S.C. § 2281, since the question is not discussed in their jurisdictional statement. The cases cited, without

discussion, by Appellants in their jurisdictional statement at page 2 all are cases dealing with legislative redistricting and in each case a duly elected or appointed state officer, within the traditional and accepted meaning of that term was a party. Nothing in those cases is analogous or similar to the jurisdiction sought to be asserted on the basis of the actions of a political party.

B. The officers and governing body of a political party, are not "state officers" or a state "board or commission" within the usual meaning of those terms.

American political parties have historically been regarded as independent organizations of private citizens, rather than as creatures of statute. In *Bunting v. Board of Canvassers and Registration,* 153 A.2d 560 (R.I. 1959), the Court said at page 562:

> "It is well established that political parties are voluntary organizations, with inherent powers of self government."

The powers of a political party derive from the constitutional rights of the individuals making up the party. A state may seek through legislation to regulate the activities of poltical parties, but the parties are not dependent upon legislative action for their existence or powers. In the early case of *Kearns v. Howley,* 41 Atl. 273 (Pa. 1898), the Court said at pages 274-75:

> "The constitution and statutes of the Commonwealth guarantee to all citizens the right of self government, by protecting them in the exercise of the elective fran-

> chise for all officers voted for at state and local elections; and lately the law has gone farther, and has so far recognized political parties as to pass an act prescribing the duties of officers at primary elections, and imposing severe penalties for misconduct. But beyond this political parties and party government are unknown to the law. They must govern themselves by party law."

Statutory regulation of the functions of a political party does not have the effect of making state officers of party officials. In *Harrell v. Sullivan,* 40 N.E.2d 115, 120 (Ind. 1942), reh. den., 41 N.E.2d 354, the court said:

> "Political parties have been the subject of state recognition and regulation in one form or another for many years. Laws pertaining to that subject are enacted pursuant to the police power of the state but do not have the effect of making political parties administrative agencies of the government. Such laws rest on the same foundation as those for the control of other groups and organizations, in the regulation of which the state finds a public interest."

There have been numerous cases dealing with discrimination against Negro voters in southern states wherein the actions of political parties have been characterized as "state action" within the meaning of that term in the Fourteenth and Fifteenth Amendments to the United States Constitution. See *Terry v. Adams,* 345 U.S. 461, 73 S. Ct. 809, 97 L. Ed. 1152 (1953); *Smith v. Allwright,* 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944).

The question of whether a political party is a private club, considered for purposes of determining whether the

party is immune from judicial control to ensure that Negros are not denied the franchise at a meaningful stage of the electoral process, is a completely different one from the question of whether the party is an arm of the state government for the purpose of deciding whether its officials are "state officers" whose actions, as permitted and regulated by statute, can be enjoined only by a three-judge court. While the decisions of the United States Supreme Court and subordinate Federal Courts have tended toward great liberality in defining the public nature of political parties when the question of racial discrimination is involved, this line of decisions should have no bearing on the completely unrelated question involved here, which is in an area where the tendency of the same courts has been toward a strict interpretation of the term "state officer."

Therefore, Appellees move for dismissal of this appeal on the basis that they are not a state officer or a state board or commission within the meaning of those terms in 28 U.S.C. § 2281 and this court therefore has no jurisdiction.

II. The Appellants have not raised a genuine challenge to the constitutionality of a state statute.

The three judge district court, in its memorandum order of April 12, 1968 correctly characterized the Appellants' attack as not one against the statute itself but against the manner in which the Appellee committee performed pursuant to that statute. The case of *Phillips v. U.S.*, 312 U.S.

246, 61 S. Ct. 480, 85 L. Ed. 800 (1941) is peculiarly in point, wherein Justice Frankfurter, speaking for the court said:

> ". . . an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of the statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the congressional scheme of § 266. Essentially the government seeks a restraint not of the statute but of an executive action." 312 U.S. at 252.

The only conduct by Appellees of which Appellants complain is the adoption of a formula for the allocation of delegates to the state convention. The only activities of that convention which bear upon any election is its selection of delegates to the Republican National Convention and its selection of presidential electors.

If the state committee's formula for allocation of delegates among countries had been mathematically in accordance with the one man-one vote rule, no alleged cause of action would exist. Thus, the allegation of an unconstitutional statute is in reality only a challenge to an alleged unconstitutional exercise of properly delegated authority.

To hold otherwise would be to extend the jurisdiction of a three judge court to all matters wherein a statutorily created body has acted in an alleged unconstitutional manner. The proper forum in such cases is a single judge district court. *Aaron v. Cooper*, 261 F.2d 97 (8th Cir. 1958).

Therefore, this appeal should be dismissed because of the failure of the Appellants to raise a genuine challenge to the constitutionality of the state statute.

III. The questions raised by Appellant are so unsubstantial as not to warrant further argument, and the judgment should be affirmed.

A. The one man-one vote principle is not applicable to the election of the President of the United States of America.

In considering Appellants' claim it must be remembered that the Appellee committee's powers in the selection of candidates for public office are limited to the selection of delegates to a national convention, the selection of presidential electors to be members of the electoral college, and the filling of any vacancy on the ticket. All other candidates for public office in Washington State are selected by a primary election held in accordance with R.C.W. 29.18. The validity of the primary election statute is not in issue.

Any alleged right which Appellants assert must therefore arise from the Federal Constitution in connection with the election of the President of the United States.

It would appear to be beyond argument that the constitutionally provided procedures for the election of the President and Vice President of the United States are not based upon the doctrine of one man-one vote. Article II, Section 1, Paragraph 2 of the United States Constitution reads as follows:

> "Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress, but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

The 12th Amendment to the United States Constitution provides for the manner of casting of votes by the electors and for the election of the President in the event that no person shall have a majority of the electoral votes. The apportionment of the electoral votes among the states is not based solely upon the population of the states. Because of the apportionment on the basis of Congressional representation, including Senators, the apportionment results in disproportionate weight to voters in the smaller states. For example, the State of Alaska has one electoral vote for each 75,389 residents, but the State of California has one electoral vote for each 392,930 persons. Thus, a voter in Alaska has approximately five times the voting strength as the voter in California in electing a Presidential elector.

The disproportionate voting is even greater in the event that no person receives a majority of the electoral votes cast. In such a situation the House of Representatives chooses the President. In choosing the President, the House of Representatives votes by states, each state having but one vote. In this situation, the State of Alaska with only approximately 250,000 persons casts a vote equal to that cast by the State of California which has approximately

18,000,000 persons. In this situation, the disparity is approximately 72 to 1.

It would appear obvious that an equally weighted vote by each person for the election of the President of the United States is not a constitutional requirement under the Federal Constitution. Appellees fail to understand how a constitutional right of an equally weighted vote in the nomination process would arise when it does not exist in the election itself.

To hold that the doctrine of "one man-one vote" is applicable to the nomination process of candidates for the president and vice presidency of the United States of America would require the elimination of the convention system as it is known today in the State of Washington and throughout the United States. The basic political unit from which delegates to the conventions are selected in the State of Washington is the precinct. The number of voters, and the percentage of Republican voters, varies from precinct to precinct. Thus "one man-one vote" is not possible in the basic voting unit from which all conventions commence.

The national conventions of neither political party base their delegate allocations solely upon the basis of "one man-one vote." The rules of the Republican National Convention which established the allocation of delegates to the next subsequent convention allocate delegates by establishing first a minimum number of delegates from each state

and then additional delegates for each congressional district, depending upon the size of the congressional district and the number of Republican voters therein. Additional delegates are allocated to a state in the event that there is a Republican governor elected in such state or in the event that the electoral vote at the last preceding presidential election was cast for the Republican nominee or in the event that the state elects a Republican United States Senator. If any state fulfills any one of the three preceding requirements it is granted a fixed number of delegates, regardless of the size of the state.

For the foregoing reason the Appellees urge that the court affirm the decree of the district court on the basis that the question is so unsubstantial as not to warrant further argument.

B. The doctrine of "one man-one vote" is not applicable to the selection of political party officials.

The principle of "one man-one vote" as enunciated by this court is limited to the election of officers exercising sovereign powers of government. No case presented to this court has extended such a doctrine to the selection of officials of a political party, such as members of Appellee committee. Even some local governments have been excluded. As the court stated in its most recent decision extending the doctrine of "one man-one vote," *Avery v. Midland County,* ..... U.S. ....., 88 S. Ct. 1114, 20 L. Ed.2d 39 (1968);

> "This Court is aware of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform straightjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local needs and efficient in solving local problems. Last Term, for example, the Court upheld a procedure for choosing a school board that placed the selection with school boards of component districts even though the component boards had equal votes and served unequal populations. Sailors v. Board of Educ., 387 U.S. 105, 18 L. Ed. 2d 650, 87 S. Ct. 1549 (1967). The
>
> Court rested on the administrative nature of the area school board's functions and the essentially appointive form of the scheme employed. In Dusch v. Davis, 387 U.S. 112, 18 L. Ed. 2d 656, 87 S. Ct. 1554 (1967), the Court permitted Virginia Beach to choose its legislative body by a scheme that included at-large voting for candidates, some of whom had to be residents of particular districts, even though the residence districts varied widely in population." 20 L. Ed. at pp. 53-54.

It would appear beyond argument that the Appellee committee is not a "unit with general governmental powers over an entire geographic area." Rather it is more in the nature of an administrative board similar to that approved by the Supreme Court in the case of *Sailors v. Board of Educ.*, 387 U.S. 105, 87 S. Ct. 1549, 18 L. Ed. 2d 650 (1967). In that case a constituency of disproportionate voting population (local school districts) selected the delegate representatives to the complained of governing body which exercised certain governmental powers over the entire

geographical area. In the instant case, county central committees, meeting pursuant to R.C.W. 29.42.030, select a state committeeman and committeewoman who become members of the Appellee state committee. The major point of distinction in the cases is the fact that in the *Sailors* case the complained of public body was exercising traditional governmental functions and was not, as in this case a quasi-private body related to and involved in but not exercising governmental functions.

Five lower courts have had occasion to consider the question raised by Appellants. All concur that the organization of a political party need not be on the basis of "one man-one vote." In the case of *Kyle v. Adams,* Cause No. 66-321-Civ-EC in the United States District Court for the Southern District of Florida, Miami Division, the Republican County Chairman for Dade County and a candidate for the Republican State Executive Committee sought a declaratory decree that the Florida statute providing for the organization of the Florida State Executive Committee was unconstitutional as denying equal protection of the law. The Florida statute creates a State Executive Committee consisting of a man and a women from each county in the State, regardless of the populations of the counties. The Executive Committee had powers practically identical to those of Apellee State Committee in this State. A three-judge court dismissed the action on its merits. The Court indicated that the Republican Committee exercised no legislative functions and the functions which they did exercise

were not public or governmental powers or duties. The few instances in which they did nominate party nominees were too remote and "with such minimal relationship to governmental activity as to include it within the one man-one vote principle." A copy of the opinion of the Judges is attached as an appendix to this brief since the decision was not reported.

The case of *Rogers v. State Committee of the Republican Party*, 232 A.2d 852 (Sup. Ct. Law Div. N.J. 1967), is another action challenging a state statute creating the state committees of political parties. The New Jersey statute also provided that each county was to elect one male and one female member to the state committee. The Plaintiff sought to have the committee dissolved as being created pursuant to an unconstitutional statute which denied the plaintiff equal protection since the population of the various counties in New Jersey was not equal. The functions of the state committee and the statute creating the state committee in New Jersey were again, for all practical purposes, identical to Washington state's. After reviewing the United States Supreme Court cases dealing with the one man-one vote doctrine, the Court said at page 855:

> "Plaintiffs here seek to extend the one man-one vote doctrine to limits beyond any reported decision. The Court agrees with defendants that the governmental functions given to the State Committee and its Chairman are minimal in significance. They exercise no legislative functions. Their principal function is the administration of the party.
>
> * * *

> "It is difficult to determine that Plaintiffs have suffered any direct or substantial harm under the facts of this case."

The States of Florida and New Jersey have presidential primary elections at which delegates to the National Political Conventions are elected. The sole distinction possible between the New Jersey and Florida situation and that in the State of Washington is that the political parties in Washington hold conventions to select delegates to the national conventions which nominate the party's candidates for President and Vice President of the United States. That no constitutional right of Plaintiffs is abridged by this procedure is discussed above.

In the case of *Lynch v. Torquado,* 343 F.2d 370 (3d Cir. 1964), the Court again affirmed the dismissal of a complaint in which the plaintiffs asserted the denial of equal protection because of the manner of election of the county chairman pursuant to the statutes of the State of Pennsylvania. The county chairman is elected by precinct committeemen who are elected at a primary election. Plaintiffs alleged that since some precincts had in excess of 700 registered Democratic voters but others had only 18 registered Democratic voters, the right to an equally weighted vote was denied. In dismissing the complaint, the Court said at page 372:

> "But the citizens constitutional right to equality as an elector as declared in the relevent Supreme Court decisions, applies to the choice of those who shall be his elected representatives in the conduct of government,

not in the internal management of a political party. It is true that this right extends to state regulated and party conducted primaries. However, this is because the function of primaries is to select nominees for governmental office even though, not because, they are a party enterprise. The people when engaged in primary and general elections for the selection of their representatives in their government, may rationally be viewed as the 'state' in action, with the consequence that the organization and regulation of these enterprises must be such as accord each elector equal protection of the laws. In contrast, the normal role of party leaders in conducting internal affairs of their party, other than primary or general elections, does not make their party offices governmental offices for the filling of these offices state action which must satisfy the requirements of Gray v. Sanders."

In the case of *Azevedo v. Jordan,* 47 Cal. Rptr. 125 (D.C.A. 1965), the Plaintiffs also asserted the doctrine of one man-one vote applied to the internal organization of the state central committee. The California State Republican Committee consists of nominees for public office and incumbent office holders and members appointed by the incumbents and the nominees. The legislature amended the act to provide that incumbent office holders would appoint eight persons to the central committee but nominees for office could appoint only three. Plaintiff appellant was a nominee and not an incumbent and thus asserted his denial of equal protection. In dismissing the claim, the Court said at page 130:

"Appellant's contention that the distinction violates the principle of one man-one vote announced in *Baker*

v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L.Ed.2d 663 is without merit. The State Central Committee is not an elective representative body of the voters exercising sovereign powers and § 8202.35 in no way impairs the successful exercise of the franchise."

In the case of *State ex rel Tomvlin v. Bivens* 149 S.E.2d 284 (W. Va. 1966) an action was brought to compel the acceptance of an election board of those persons who had been nominated by the duly elected party committee. The defense was based on the contention that the statute creating the political party executive committee violated the equal protection clause as not being constituted under the "one man-one vote" doctrine and the executive committee of the political party was vested with sovereign power and its members were public officers. The court denied these contentions and held that the members of the executive committee of the political party were not public officers, and the "one man-one vote rule" would be applicable only to the election of public officers. In this case the members of the committee were elected on a manifestly unequal population basis from districts which were then malapportioned.

The foregoing cases, each directly in point, conclusively indicate that there is no constitutional right to an equally weighted vote in the internal organization of a statutorily created political body. Likewise the statute creating and providing for the formation of a state committee on the basis of geographical units and not upon population, vio-

lates no right protected or granted under the Fourteenth Amendment to the United States Constitution.

Therefore, Appellees urge the court to affirm the decision of the court below, the question being so unsubstantial as not to warrant further argument.

Respectfully submitted,

BRADLEY T. JONES

EDWARD N. LANGE

RICHARD A. DERHAM

Attorneys for Appellees.

Appendix A

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MARCUS A. KYLE,
Plaintiff,

vs.

TOM ADAMS, Secretary of State of the State of Florida, and MARTIN BRATERMAN, SUPERVISOR OF REGISTRATION for Dade County, Florida, et al.,
Defendants.

66-321-Civ-EC

Before JONES, Circuit Judge, DYER, Chief Judge, and CHOATE, District Judge

OPINION AND ORDER

The plaintiff, a Republican, a registered voter, the Republican County Chairman for Dade County, Florida, a Republican County Committeeman and a candidate for the Republican State [of Florida] Executive Committee seeks a declaratory decree that the Florida statute[1] providing for

1. The state executive committee of each political party shall consist of two members, a man and a woman for each county, who shall be elected for four years in the second primary elections held in the year 1958 and every four years thereafter. The members of the executive commitee shall, within thirty days after their election, meet and organize by electing from their members a chairman and a vice-chairman, one of whom is a man and the other a woman, and a vice-chairman for each congressional district, and other such officers as each committee deems necessary. The outgoing chairman of the state executive committee shall, not less than ten days before the first meeting, notify each newly elected member of the time and place of the meetings. F.S.A. § 103.111(1).

the composition and manner of electing the members of the State Executive Committees of political parties is unconstitutional as denying equal protection of law to the plaintiff. Injunctive relief was sought. A three-judge court was constituted pursuant to 28 U.S.C.A. §§ 2281, 2284.

The state executive committees exercise no legislative functions. Their principal functions are confined to the administration of the political parties, the selection of party officers, the selection of candidates for presidential electors, and the carrying on of political campaigns. These are not the exercise of public or governmental powers or duties. 25 Am. Jur. 2d 810, Elections § 124. In rare instances and extraordinary situations a committee can select a party nominee for public office. This is a power too remote and with such minimal relationship to governmental activity as includes it within the one man-one vote principle which is applicable to state legislative bodies. We are in full accord with the decision in Lynch v. Torquato, 3rd Cir. 1965, 343 F.2d 370, where the issue here presented was decided contrary to the contention of the plaintiff. The complaint shows no facts upon which relief can be granted and the action will be dismissed.

It is, therefore, ORDERED AND ADJUDGED that the cause is hereby dismissed on the merits and judgment for the defendants and against the plaintiff is hereby rendered at the plaintiff's cost.

ORDERED and ADJUDGED this 31st day of May, 1966.

S/WARREN L. JONES
United States Circuit Judge

S/DAVID W. DYER
Chief Judge, U.S. District Court

S/EMETT C. CHOATE
United States District Judge

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

DAHL ET AL. *v.* REPUBLICAN STATE COMMITTEE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 596. Decided January 20, 1969.

PER CURIAM.

The judgment of the District Court is vacated and the cause is remanded in order that the District Court may enter a fresh decree from which appellants may, if they wish, perfect a timely appeal to the Court of Appeals. *Moody* v. *Flowers*, 387 U. S. 97.

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE HARLAN, believing that jurisdiction lies in this Court, would affirm the judgment below.